

Minor, Dustin

From: Keith Takata <keith@keithtakata.com>
Sent: Thursday, October 16, 2014 10:16 PM
To: Lyons, John;Minor, Dustin;Shaffer, Caleb;thompson, rachel;Dreyfus, Bethany
Subject: Fwd: Orange County Water District/North Basin

I thought you might be interested in the attached email. OCWD is meeting with Stewart Black on October 21st and with CalEPA on October 31st.

Hope to see you all soon.

Keith

Keith Takata
Takata Environmental LLC
keith@keithtakata.com
650-862-1162
www.keithtakata.com

Begin forwarded message:

From: "Scott A. Sommer" <scottsommer@sasrlaw.com>
Subject: Orange County Water District/North Basin
Date: October 16, 2014 at 3:31:58 PM PDT
To: "steve.koyasako@dtsc.ca.gov" <steve.koyasako@dtsc.ca.gov>
Cc: "jmacedo@waterboards.ca.gov" <jmacedo@waterboards.ca.gov>, "ccarrigan@waterboards.ca.gov" <ccarrigan@waterboards.ca.gov>, Keith Takata <keith@keithtakata.com>

Steve- I wanted to put in written form the discussion that you and I had on the concerns about the state acting as lead agency on North Basin. Thank you for your insights and time on this matter. There is a meeting coming up on Tuesday October 21 at Stewart Black's office and the issues we addressed will come up at that time.

As I said, DTSC is currently spending significant state funds on soil remediation onsite at the Chicago Musical Instruments site in North Basin. Orange County Water District (OCWD) is most appreciative of these efforts. It is entirely appropriate that the onsite oversight by DTSC and the Regional Board on several PRP sites in North Basin continue as has occurred in the past. However, notwithstanding the years of state regulatory efforts, nothing has been done, nor is proposed, for the substantial regional groundwater plume off the Chicago Musical Instruments site, as well as the Northrop Y-12 downgradient plume, and the

impacts on beneficial groundwater are very substantial. I will provide more detail on that below, and can get you more information and maps for further review.

Turning to the issue of regional groundwater enforcement and the appropriate lead agency, we are very concerned about the inability of DTSC to use joint and several liability under HSAA and how vulnerable DTSC would be were it to act as lead agency in North Basin. H&S Code 25363 and other provisions do not give the state joint and several enforcement or cost recovery authority. 25363(e) provides that the state fund is susceptible to a separate action for contribution even if DTSC tried to use CERCLA as Barbara Cook once briefly mentioned at our August task force meeting. Note the exposure of the state fund, for example, to a separate action by a major PRP for contribution against the state fund in the event of a clean up order that incorporated the large groundwater plume coming from Chicago Musical Instruments, for example. Note that this risk in the event of proceedings brought by DTSC applies even if the determination is made under “the federal act”, of course CERCLA.

As DTSC does not have joint and several authority and is required to apportion, if DTSC serves as lead agency the state fund would be exposed to a very substantial figure for the necessary regional groundwater remediation from the Chicago Musical Instruments site. Health and Safety Code 25363 provides:

- (a) Except as provided in subdivision (f), **any party found liable for any costs or expenditures recoverable under this chapter who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion.**
- (b) Except as provided in subdivision (f), if the trier of fact finds the evidence insufficient to establish each party's portion of costs or expenditures under subdivision (a), **the court shall apportion those costs or expenditures,** to the extent practicable, according to equitable principles, among the defendants.
- (c) **The state account shall pay any portion of the judgment in excess of the aggregate amount of costs or expenditures apportioned under subdivisions (a) and (b).**
- (d) The standard of liability for any costs or expenses recoverable pursuant to this chapter is strict liability.
- (e) Any person who has incurred removal or remedial action costs in accordance with this chapter or the federal act may seek contribution or indemnity from any person who is liable pursuant to this chapter, except that no claim may be asserted against a person whose liability has been determined and which has been or is being, fully discharged pursuant to Section 25356.6, or against a person who is actively participating in a pending apportionment proceeding pursuant to Section 25356.6. **An action to enforce a claim may be brought** as a cross-complaint by any defendant in an action brought pursuant to Section 25360 or this section, or **in a separate action after the person seeking contribution or indemnity has paid removal or remedial action costs in accordance with this chapter or the federal act.** Any plaintiff or cross complainant seeking contribution or indemnity shall give written notice to the director upon filing an action or cross complaint under this section. In resolving claims for contribution

or indemnity, the court may allocate costs among liable parties using those equitable factors which are appropriate. (f) Notwithstanding this chapter, any response action contractor who is found liable for any costs or expenditures recoverable under this chapter and who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to the response action contractor's actions, shall be required to pay only that portion of the costs or expenditures attributable to the response action contractor's actions.

The problems noted above would not be applicable to EPA potentially negotiating settlements or issuing orders in North Basin pursuant to CERCLA. The inability of the state agencies to address the regional groundwater plume poses a grave risk to the water supply in Orange County. The best solution we see is for EPA to address the regional groundwater plume with support on continuing site enforcement from DTSC and the Regional Board, and with all the assistance OCWD can provide.

As I said, the South Basin plume is also a grave threat to water supply in the southerly portion of the Orange County aquifer. We see the South Basin situation as significantly different and far more appropriate for a DTSC and/or Regional Board lead or co-lead agency role. Given the facts and parties involved there, we think that there is not a risk involving joint and several enforcement of the type present in North Basin. We would very much like to discuss the role of DTSC and the Regional Board on regional groundwater remediation on South Basin as we move forward on North Basin.

Please contact me with any questions or comments.

Law Office of Scott A. Sommer
Professional Corporation
55 Second Street, 21st Floor
San Francisco, CA 94105-3470
Direct: 415-805-7943
Cell: 925-963-1245

-----Original Appointment-----

From: Barnett, Lim@DTSC [<mailto:Lim.Barnett@dtsc.ca.gov>]

Sent: Thursday, October 16, 2014 7:40 AM

To: Black, Stewart@DTSC; Cook, Barbara@DTSC; Scandura, John@DTSC; Keith Takata (takata.keith@gmail.com); mwehner@ocwd.com; dmark@ocwd.com; Scott A. Sommer;rherndon@ocwd.com; mmarkus@ocwd.com; Bolin, David (DBolin@ocwd.com)

Subject: OCWD

When: Tuesday, October 21, 2014 11:30 AM-12:30 PM (UTC-08:00) Pacific Time (US & Canada).

Where: HQ - Conference Room TBA / Conference Line: 866.507.2042 PC 3861812 (Leader: Stewart)

UPDATING: Agenda (below) added – Also, this meeting will be attended in person by some OCWD participants at CalEPA HQ building (room to be announced later)

Requestor: Stewart Black

Participants: Stewart, Barbara and John (DTSC); Keith Takata (consultant); and Mike Wehner, Roy Herndon, Dave Mark, Scott Sommer and Mark Markus (for OCWD)

Purpose of Meeting: This conference call is being set up in lieu of an in-person meeting which needed to be canceled due to illness on October 8

Date/Time/Location: Tuesday, October 21, 11:30 a.m. – 12.30 p.m./ HQ Conference Room TBA
- Conference Line: 866.507.2042 PC 3861812 (Leader: Stewart)

<< File: Agenda OCWD DTSC 10-21-14.docx >>

Minor, Dustin

From: Keith Takata <keith@keithtakata.com>
Sent: Thursday, October 16, 2014 10:16 PM
To: Lyons, John;Minor, Dustin;Shaffer, Caleb;thompson, rachel;Dreyfus, Bethany
Subject: Fwd: Orange County Water District/North Basin

I thought you might be interested in the attached email. OCWD is meeting with Stewart Black on October 21st and with CalEPA on October 31st.

Hope to see you all soon.

Keith

Keith Takata
Takata Environmental LLC
keith@keithtakata.com
650-862-1162
www.keithtakata.com

Begin forwarded message:

From: "Scott A. Sommer" <scottsommer@sasrlaw.com>
Subject: Orange County Water District/North Basin
Date: October 16, 2014 at 3:31:58 PM PDT
To: "steve.koyasako@dtsc.ca.gov" <steve.koyasako@dtsc.ca.gov>
Cc: "jmacedo@waterboards.ca.gov" <jmacedo@waterboards.ca.gov>, "ccarrigan@waterboards.ca.gov" <ccarrigan@waterboards.ca.gov>, Keith Takata <keith@keithtakata.com>

Steve- I wanted to put in written form the discussion that you and I had on the concerns about the state acting as lead agency on North Basin. Thank you for your insights and time on this matter. There is a meeting coming up on Tuesday October 21 at Stewart Black's office and the issues we addressed will come up at that time.

As I said, DTSC is currently spending significant state funds on soil remediation onsite at the Chicago Musical Instruments site in North Basin. Orange County Water District (OCWD) is most appreciative of these efforts. It is entirely appropriate that the onsite oversight by DTSC and the Regional Board on several PRP sites in North Basin continue as has occurred in the past. However, notwithstanding the years of state regulatory efforts, nothing has been done, nor is proposed, for the substantial regional groundwater plume off the Chicago Musical Instruments site, as well as the Northrop Y-12 downgradient plume, and the